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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re the Marriage of IAN W. and MARGOT B.
IAN W., Respondent, v. MARGOT B., Appellant.

A160486

(Contra Costa County
Super. Ct. No. D16-05298)

Margot B.¹ appeals from the trial court's denial of her request for attorney fees under Family Code² section 2030. She contends the trial court had a mandatory duty to award her fees because it found both a disparity in the parties' financial resources and the ability of her former husband, Ian W., to pay her fees. She argues in the alternative that the trial court

¹ We refer to the parties by their first names and last initial out of respect for their privacy. (Cal. Rules of Court, rule 8.90(b)(10).)

² Undesignated statutory references are to the Family Code.

abused its discretion by finding Ian W. was not able to pay her fees. We disagree with both arguments and affirm.

BACKGROUND

Margot B. and Ian W. married in August 2007. They had two children, born in 2008 and 2010. A judgment filed in August 2018 dissolved the marriage and incorporated the terms of a settlement agreement.

The parties proceeded to litigate to various matters post-judgment, including (1) a custody dispute based on Ian W.'s allegation that Margot B. drove her car under the influence of alcohol with their children in the car and (2) his request for a domestic violence restraining order based on his allegation that she had harassed him and his then-fiancée and broken into their car. Ian W. prevailed on both of these issues, with the trial court awarding him sole legal and physical custody of the children and issuing the restraining order. The parties agreed a few months later to appoint a private judge to rule on their disputes. Margot B. was obligated to pay 10 percent of the private judge's fees up to a maximum of \$1,000, while Ian W. would pay all other private judge fees up to a maximum of \$20,000, at which point Ian W. could elect to terminate the appointment and return the matter to public court.

In November 2019, Margot B. filed a request for an order requiring Ian W. to pay \$25,000 towards prospective expert fees and \$60,000 or \$75,000 towards her attorney fees. Margot B. later increased her attorney fees request to \$100,000. By the time of the hearing on her request, Margot B. had paid \$135,000

towards her prior counsel and \$114,500 towards her current counsel, and she owed an additional \$22,700 to her current counsel.³

Margot B. filed statements of her income and expenses with her fee request. While she had not filed taxes in the past two years, she had an average monthly gross income of \$2,100 as an independent contractor from her work as an office manager/virtual assistant and received \$3,450 in spousal support from Ian W. She had a negative balance in her bank and other deposit accounts; \$180,000 in stocks, bonds, or other assets she could easily sell; some amount of equity in the family home she had received pursuant to the settlement; an inheritance of around \$25,000; and \$11,100 in monthly expenses. Margot B. declared she had only recently returned to the workforce, had variable hours in her work, and the domestic violence restraining order had prevented her from securing a permanent full-time position. She also asserted in her request that she had used her savings, support payments, and credit cards to pay her attorney, although she did not list any credit card debt. She acknowledged that there had been one prior award of need-based attorney fees of \$18,000 in 2018.

Ian W.'s income and expense declaration showed he earned an average of \$87,600 in monthly gross income as legal director for Google; paid \$200 per month for health insurance; had

³ For simplicity and because nothing turns on the precise figures, most dollar amounts stated in this opinion are rounded to the nearest \$100.

\$31,400 in bank or deposit accounts; no stocks, bonds, or other assets he could easily sell; no real property; personal property valued at an unspecified amount; and \$33,600 in monthly expenses. Ian W.'s monthly income in the preceding year after taxes was \$52,100. His monthly expenses included \$7,100 per month in child support that he had been paying to Margot B. He listed a monthly expense of \$3,450 in base spousal support to Margot B., which matched Margot B.'s income declaration. But Ian W. stated that he also paid Margot B. an extra \$6,100 in bonus spousal support, for a total of \$9,550 per month. (See *In re Marriage of Ostler & Smith* (1990) 223 Cal.App.3d 33, 42, 50 [trial court could require supporting spouse to pay a percentage of future cash bonuses].) He further declared that Margot B. had received \$53,000 in the prior two years in distributions under the marital settlement agreement. Ian W. owed \$94,000 in credit card debt and back taxes. He had incurred more than \$600,000 in attorney fees and litigation costs and had borrowed \$150,000 to help pay them. Those fees and litigation costs included \$24,700 he had paid in fees for the private judge, \$14,000 for a child custody evaluator, \$1,100 for co-parenting counseling, and \$1500 to \$2000 for a vocational evaluation for Margot B.

Besides opposing Margot B.'s request for fees, Ian W. asked the court to modify his child support obligation retroactively and prospectively. The child support was calculated based on Margot B. caring for the children 50 percent of the time, but Margot B. had subsequently lost legal and physical of the children. Ian W. asked for Margot B. to pay him child support now that he cared

for the children and asked for a refund of \$21,000 based on a recalculation of child support and a credit of \$41,100 under *In re Marriage of Trainotti* (1989) 212 Cal.App.3d 1072, 1075–1076 (*Trainotti*) for the period in which he had assumed sole physical responsibility for the children.

The record on appeal does not contain any transcripts or written order from the hearing at which the trial court apparently addressed Ian W.’s requests related to child support. From what we can glean from the record, the trial court agreed that Ian W. had overpaid his child support by about \$41,100 but ruled he was not legally entitled to a refund. The trial court nonetheless indicated that it would consider taking the overpayment into account when considering Margot B.’s attorney fees request. The trial court also apparently modified the child support order so that Margot B. had to pay Ian W. \$577 in monthly child support prospectively, which she was doing by offset against Ian W.’s monthly spousal support payment to her.

At a subsequent hearing on the fee request, Margot B. clarified that she was asking for prospective expert fees to determine whether she had received all the distributions under the settlement agreement to which she was entitled. Margot B. did not specifically allege that she had not received payment in full and said only that she wanted to look into the issue. The trial court denied her request for expert fees because it found no need for an expert for the purposes Margot B. had identified.⁴

⁴ Margot B. does not appeal the ruling on her request for expert fees.

For the attorney fees request, the court found that while the parties' incomes might have been nearly equal in the prior two years, prospectively their incomes would not be equal because the flow of child support had shifted and Margot B. was now paying child support to Ian W. The court found that Margot B. had a need for a contribution to her attorney's fees because she could not afford to pay the fees she had already paid as well as ongoing fees for future litigation. However, the court could not find that Ian W. was able to contribute to Margot B.'s fees. While his income was higher, he had already paid \$18,000 towards her fees, and he was entitled to a significant credit for \$41,100 in overpaid child support, \$20,000 for the private judge fees, and \$14,000 for the custody evaluator. The court also noted that Ian W.'s \$600,000 in attorney fees were reasonable because he had more information regarding the financial issues in the dissolution and he was the moving party on the extensive domestic violence restraining order litigation. The trial court therefore said it would deny Margot B.'s attorney fees request. The written order following the hearing denied the request without explanation.

DISCUSSION

Section 2030 requires trial courts to ensure that each party in a dissolution proceeding, including postjudgment proceedings, has access to legal representation by ordering one party to pay a reasonable amount of the other party's attorney fees and costs. (§ 2030, subd. (a)(1).) The purpose of such a need-based attorney fee award is not redistribution of money from one party to another but parity in both spouses' ability to obtain effective legal

representation. (*Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, 251–252.) Section 2030, subdivision (a)(2) provides that when one party requests attorney fees, “the court shall make findings on whether an award of attorney’s fees and costs under this section is appropriate, whether there is a disparity in access to funds to retain counsel, and whether one party is able to pay for legal representation of both parties. If the findings demonstrate disparity in access and ability to pay, the court shall make an order awarding attorney’s fees and costs.” The use of “shall” in these instructions indicates that the trial court is required to make the specified findings expressly, either in writing or orally on the record. (*In re Marriage of Morton* (2018) 27 Cal.App.5th 1025, 1050 (*Morton*).) Because the statute now uses the mandatory “shall” language, whereas the statute had previously used the permissive “may,” “it is no longer accurate to refer to a trial court’s ‘broad discretion’ when describing a trial court’s responsibilities under section 2030.” (*Id.* at p. 1049.)

Section 2032, subdivision (a) provides that a court may award fees under section 2030 “where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties.” Subdivision (b) of that statute instructs, “In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party’s case adequately, taking into consideration, to

the extent relevant, the circumstances of the respective parties described in Section 4320,” which governs spousal support awards. (§ 2032, subd. (b).)

“ ‘On appeal, we review an attorney fee award under section 2030 for an abuse of discretion.’ [Citation.] . . . [Citation.] Applying the abuse of discretion standard, we consider de novo any questions of law raised on appeal but will uphold any findings of fact supported by substantial evidence. [Citation.] The trial court’s order ‘will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made.’ ” (*In re Marriage of Smith* (2015) 242 Cal.App.4th 529, 532.) Margot B., as the appellant, has the burden to show the trial court abused its discretion. (*Kevin Q. v. Lauren W.* (2011) 195 Cal.App.4th 633, 644.)

In her first argument, Margot B. argues that an award of fees was mandatory because the trial court found both a disparity in access to funds for litigation and Ian W.’s ability to pay her fees. She then contends the trial court failed to make the mandatory award of fees that section 2030 requires and improperly considered discretionary factors under section 2032 as a basis for denying her request. Confusingly, Margot B. also faults the trial court for not making the findings that section 2030, subdivision (a)(2) requires. We construe this as an argument in the alternative to her assertion that the trial court found Ian W. was able to pay her fees.

The trial court did find a disparity in access to funds prospectively because Margot B.'s income would not be equal or even close to equal to Ian W.'s after her child support payment. But Margot B. cites nothing in the record to support her assertion that the trial court also found Ian W. had the ability to pay Margot B.'s fees. To the contrary, the record shows that the trial court found Ian W. was *not* able to pay her fees.

The trial court recognized that Ian W.'s high taxes reduced his income and that he had made a significant overpayment of child support. It noted that he had paid almost all of the private judge's fees and all the fees for the custody evaluator, and ruled that those costs would not be subject to reallocation. The court also noted that he had paid substantial attorney's fees of his own and found those fees were reasonable. The court then concluded, "[A]dding together all of the points that I've just made, I am not in a position to make an order that Mr. [W.] is -- has the ability to make any further contribution to Ms. [B.]'s attorneys' fees." The trial court then added that Ian W. had paid \$18,000 towards Margot B.'s fees already and said it would deny Margot B.'s attorney fees request.

While the language of the trial court's conclusion about Ian W.'s inability to contribute to Margot B.'s fees could have been clearer, its remarks as a whole show that its conclusion was intended to be the express finding regarding Ian W.'s ability to pay that section 2030 required. (*Morton, supra*, 27 Cal.App.5th at p. 1050 ["the phrase 'the court shall make findings' [in § 2030, subd. (a)(2)] requires the court to make express findings—that is,

findings stated in words, either in writing or orally on the record”].) Margot B.’s argument that the trial court failed to make the necessary finding is therefore incorrect. Likewise, because the trial court did not find that Ian W. was able to pay Margot B.’s fees, an award of fees was not mandatory.

In her second argument, Margot B. contends that the trial court abused its discretion by finding Ian W. was not able to pay her fees at all. She asserts that the trial court’s finding that Ian W. was not able to make any further contribution was based on crediting Ian W. with overpayment of child support under *Trainotti* and payment of a disproportionate share of other litigation expenses. Regarding the overpayment of child support, she points out the overpayment was actually only \$41,100, not the \$45,000 that the trial court stated. She also asserts that the trial court had previously said Ian W. was not legally entitled to recoup the overpayment, and she posits without argument or citation to authority that it was improper to achieve the same result by denying Margot B.’s request for fees. Margot B. further argues the trial court should have simply added the \$41,100 child support overpayment, as well as the \$20,000 in private judge fees and \$14,000 in custody evaluation fees, onto Margot B.’s income for the disparity analysis rather than relying on them to deny her fees request.

Margot B. is correct that the trial court misstated the amount of the child support overpayment, and Ian W. concedes the point. Even taking that into account, we nonetheless conclude that substantial evidence supports the trial court’s

finding of Ian W.'s inability to further contribute to Margot B.'s attorney fees. Regarding the child support overpayment, the record does not contain a transcript of the hearing at which the trial court ruled on Ian W.'s request for reimbursement of the overpaid child support, nor does it contain any written order denying that request. The trial court's rationale for denying the request is therefore unclear, and this works against Margot B. Trial court judgments are presumed correct, and appellants have the burden of presenting an adequate record to demonstrate error. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608–609; *Rhule v. WaveFront Technology, Inc.* (2017) 8 Cal.App.5th 1223, 1228.) We cannot assume, as Margot B. appears to, that the trial court denied the request because it believed there was no overpayment. Moreover, though not definitive, the record actually supports the trial court's ruling, since Margot B.'s attorney filed a declaration in the trial court admitting that the trial court had indicated it might take into account Ian W.'s *Trainotti* overpayment when ruling on the attorney fees request.

Margot B.'s more general contention that the trial court should have treated the child support overpayment and Ian W.'s disproportionate share of joint litigation expenses as additions to her income ignores the fact that the trial court was considering Ian W.'s ability to pay, not her own. The trial court already found Margot B.'s income was not equal to Ian W.'s, so there was no need to add any sums to Margot B.'s income. The only issue remaining was whether Ian W. was able to make an additional contribution to Margot B.'s \$245,000 in attorney's fees, beyond

the \$18,000 he had paid early in the case. The fact that Ian W. had also paid an extra \$41,100 in child support and \$16,500 in litigation expenses that Margot B. otherwise would have had to pay (\$19,000 more in private judging fees plus \$14,000 in child custody evaluation fees, divided in half) was directly relevant to Ian W.'s ability to pay more, regardless of whether the payments are treated as expenses or transfers to Margot B.

Ian W.'s payment of these sums on their own might not be enough to show an inability to contribute to Margot B.'s attorney fees, in light of his substantial gross monthly income of \$87,600. Even if this were true, which we need not decide, the trial court recognized Ian W. received significantly less after taxes and had incurred substantial attorney fees of \$600,000 of his own. Margot B. contrasts Ian W.'s fees with her own fees of \$245,000, perhaps to demonstrate an unfairness in the parties' respective abilities to fund the litigation. But she ignores the trial court's finding that Ian W.'s fees were reasonable because he had to provide more information regarding financial issues and he bore the brunt of the cost for obtaining the domestic violence restraining order. Also, as Ian W. points out, the evidence before the trial court showed that he had loans totaling \$150,000 to pay his attorney fees, almost \$100,000 in credit card and tax debt, and high monthly expenses of \$33,600. Those expenses included substantial spousal support payments to Margot B. of \$9,500 per month. The trial court did not expressly remark on Ian W.'s debt, but Ian W. described it in his written briefing, which the trial court said at the hearing it had considered in full, and Ian W.

raised it again in argument at the hearing. Taking all of this together, the trial court could reasonably conclude that despite the large disparity in the parties' gross incomes, Ian W. had no ability at the time to pay more towards Margot B.'s fees. But, as the trial court recognized and acknowledged, Margot B. remains free to make another request for attorney fees in the future, if changes in the parties' circumstances should warrant.

DISPOSITION

The trial court's order is affirmed.

BROWN, J.

WE CONCUR:

STREETER, ACTING P. J.
DESAUTELS, J.*

In re Marriage of Ian W. and Margot B. (A160486)

* Judge of the Superior Court of California, County of Alameda, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.